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No. 394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

IN THE MATTER OF APPLICATION OF BEN G. LEVY FOR ADMISSION TO PRACTICE IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS, PETITIONER

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF HOUSTON BAR ASSOCIATION

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Question Presented

Was the denial to Petitioner of membership in the Bar of the United States District Court an abuse of discretion that offended due process of law?

This was the question raised in the Petition for Writ of Certiorari. Amicus Curiae submits that there is no other issue for it is in complete accord with the contention of Petitioner that the right to practice law in the United States

District Court is not to be denied an otherwise acceptable person simply because he holds unorthodox views. Amicus Curiae does, however, contradict the contention of Petitioner that *he* was an otherwise acceptable person who was denied the right to practice simply because of unorthodox views; that contention assumes as true the fundamental points at issue and it is to that assumption that Amicus Curiae is opposed.

It is further submitted that the embellishments and additional questions now raised in Petitioner's Brief under this heading which were not present in the Petition for Writ of Certiorari should be disregarded as not in conformity with Supreme Court Rule 40(2).

Constitutional Amendments Statute and Court Rule Involved

The following, the pertinent text of which is set forth in Appendix A, page 27 hereof, are involved in this proceeding:

The First Amendment, United States Constitution.
The Fifth Amendment, United States Constitution.
Section 2071, Title 28, U. S. Code.
Rule 5, Local Rules of United States District Court for the Southern District of Texas.

Statement

The Petitioner was enrolled as an attorney in the Supreme Court of Texas on November 17, 1952 and during June, 1953 he applied for admission to the Bar of the United States District Court for the Southern District of Texas (R. 2-3).

Rule 5 of the local rules of the said court sets forth the requirements and procedure to be followed by persons seeking admission as attorneys and specifies that "(one) whose private and personal character shall be unexceptional, and who is competent to practice in this Court may be admitted to the Bar of this Court" (R. 34). Petitioner prepared a required personal statement and obtained two recommendations of resident practitioners of the District; he was then interviewed by the Chairman of the Bar Committee appointed by the Judges of the Court pursuant to Rule 5(c) for the purpose of examining the fitness and qualifications of all applicants. The Committee later recommended against Petitioner's admission to membership in the Bar of the United States District Court for the Southern District of Texas.

The Petitioner filed exceptions to the Bar Committee's report (R. 7) and was granted a full hearing thereon before the three Judges of the Court. At the beginning of the hearing, Petitioner was advised that he had the choice of having his application referred back to the Bar Committee for reconsideration of his application and for the reception of additional evidence of his qualifications (R. 9-10), but Petitioner declined the opportunity and chose to stand on his exceptions.

Thereupon the Petitioner proceeded to address the three District Judges at length (R. 10-19) and then invited questioning from the bench (R. 19) which followed (R. 19-33) until Petitioner acknowledged that he had nothing further to say. The Court then recessed and on November 24, 1953, entered an order approving the Bar Committee's Report and Recommendation that Petitioner be denied admission to the Bar of the Court (R. 34-36). It is to be noted that the order specifically provided that Peti-

tioner "shall have the right, at any time after the expiration of one year from this date, to again apply for admission to this Bar" (R. 36). Notwithstanding this privilege, Petitioner appealed immediately to the United States Court of Appeals for the Fifth Circuit (R. 36) which Court affirmed the order of the District Court Judges (R. 37-42) and denied a subsequent motion for rehearing (R. 47).

Summary of Argument

Admission to the practice of law is a privilege and not a right. Each court is empowered to set reasonable standards of professional competence and high moral character as requisites for admission to its rolls. Each person who seeks for himself the grant of such privilege has the obligation of satisfying the court that he has the necessary qualifications. When a candidate fails to satisfy this burden of proof, he is not entitled to the privilege of Bar membership. Rejection of an application invades none of the applicant's constitutional rights, unless the decision was clearly unreasonable or arbitrary.

Since the petitioner in the matter now under consideration failed to satisfy the members of the Committee on Admissions and the District Judges that his personal character met the prescribed standards, an examination of the complete record will show that the order resulted from Petitioner's failure to discharge the burden of proof rather than from error or arbitrary action on the part of the District Judges.

In addition, the question presented is moot and the proceeding does not present a justiciable controversy from which an appeal may be taken.

Argument

I.

Admission to the Bar of the United States District Court is not a right but a privilege to be granted only to those who satisfy reasonable standards of professional competence and high moral character, in accordance with regulations prescribed by the United States District Court.

The United States District Court for the Southern District of Texas in 1940 revised its Local Rule 5 governing the admission of new attorneys so that its membership would be maintained on a consistently high calibre. Thenceforth, an applicant was required to submit documentary evidence of his professional training and competence. In addition, a Committee on Admissions was established to investigate the fitness, competency and qualifications of each applicant. An attorney who obtained a favorable recommendation from the Bar Committee by showing that his "private and professional character" was "unexceptional" would be admitted to practice in the United States District Court. The provisions of Local Rule 5, which are set forth in Appendix A and on R. 34-35, were adopted pursuant to the statutory authority granted to the Judges of the District Court under Title 28, U. S. Code, Section 2071, which is also set forth in Appendix A.

Petitioner has not raised any question concerning the propriety or reasonableness of Local Rule 5. He complains only of its application in his case.

The right to practice law is not an absolute right nor a natural right, but it is a privilege conferred by law on one

who complies with prescribed conditions. It is obvious that fidelity to the government under which one lives and good character are essential attributes for admission to the bar. Members of the legal profession, at least in this country, are still leaders of legislation and moulders of justice, persons who should not lose sight of the values of the intellect and spirit. These principles are aptly stated in *Re Keenan*, 314 Mass. 544, 50 N.E. 2d 785 at 786:

> "The right to practice law is not one of the inherent rights of every citizen, as is the right to carry on an ordinary trade or business. It is a pecu*l*ar privilege granted and continued only to those who demonstrate special fitness in intellectual attainment and in moral character. All may aspire to it on an absolutely equal basis, but not all will attain it. Elaborate machinery has been set up to test applicants by standards fair to all and to separate the fit from the unfit. Only those who pass the test are allowed to enter the profession, and only those who maintain the standards are allowed to remain in it. To those who acquire and who retain the necessary qualifications is granted a monopoly of the honors and emoluments of a profession which more than any other is public in its nature and intimately connected with the highest functions of the State. Such a monopoly in a quasi public occupation is in no sense promoted and fostered for the personal advantage of individuals. It can be justified only on the ground that long experience has shown it to be absolutely essential to the public welfare. All this is familiar enough. It is adverted to here only for the purpose of emphasizing at the outset that in deciding a case of this kind considerations of public welfare are wholly dominant. The question is not whether the respondent has been 'punished' enough. To make that the test would be to give undue weight to his private interests, whereas the true test must always be the public welfare. Where

> any clash of interest occurs, whatever is good for the individual must give way to whatever tends to the security and advancement of public justice."

In the case of *In Re O'Brien's Petition*, 79 Conn. 46, 63 Atl. 777, the Court discussed the rules of admission in Connecticut and set forth the historical background of the rules dealing with admission to practice law. See also Justice Cardozo's comments in *People ex rel Karlin v. Culkin*, 248 N.Y. 465, 162 N.E. 487.

It has long been recognized that the adminitsration of justice is best served by the Courts carefully considering each application and denying those where for any proper reason the applicant should not be admitted to practice law. As said in *Booth v. Fletcher*, 101 F. 2d 677, 680-681 (C.A., D.C.):

> "The lawyer is an officer of the court of whose bar he is a member. It is his privilege and his duty to promote the administration of justice. The profession of the law is one charged in the highest measure with the public interest. Chief Justice Charles E. Hughes has characterized the service of the profession as ' * * * the privileged administration of a public trust affording the necessary means by which private and public rights are vindicated, private and public wrongs are redressed, and the very basis of civilization is made secure.' The theory of appellee's alleged cause of action was that a right of private property had been improperly interfered with. But a lawyer may properly be dispossessed of that right if he uses it in a manner inimical to the public interest. It is a right which is minor and collateral, indeed, compared to the public significance of the status and functions of the lawyer. The people have entrusted to the courts power to regulate standards of education and admission to the bar and power

> to regulate the conduct of members of the bar by orders of discipline and disbarment. *If those not properly trained or those who are morally disqualified are permitted to practice before the courts,* the administration of justice will suffer. 'It is not enough that the doors of the temple of justice are open; it is essential that the ways of approach be kept clean'." *Hatfield v. King,* 184 U.S. 162, 168.

The Court below said with reference to Petitioner (R. 40):

> "He concedes that he has no constitutional right to practice law, that that is a matter of privilege. This principle of law is so well established that it does not require discussion. See 7 C.J.S., p. 708."

Petitioner does not challenge this statement.

II.

Petitioner had the burden of proving that he possessed the requisite qualifications, and on the basis of the evidence and the hearing before the Court, the order of the judges denying petitioner admission to the Federal Bar was not a violation of due process of law.

Having been admitted to practice law in Texas, the Petitioner became eligible for membership in the Bar of the United States District Court for the Southern District of Texas if he could prove that he possessed the requisite qualifications. He prepared a brief affidavit as to his age, residence and eligibility (R. 3), and provided two recommendations of local attorneys (R. 4). When Petitioner appeared before the Chairman of the Admissions Committee and was questioned as to his relationship with his employer, Morris

Bogdanow, and particularly with regard to his familiarity with his employer's general reputation of being a communist, Petitioner was evasive. At best, he evidenced an indifference as to whether he was employed by a communist.

The full Committee considered Petitioner's application and subsequently reported that he "has not satisfied the Committee that he is entitled to admission" (R. 5). The reasons assigned by the Committee were:

> "He is associated with Morris Bogdanow, who is generally considered to be a member of the Communist Part-. At least, he is referred to as a communist openingly and in publications.
>
> "In previous cases, we have had valuable as-istance from the F.B.I. in getting some idea about whether applicants are communists. In the case of Mr. Bogdanow, assistance was declined. Expressing purely an opinion, we are inclined to believe that there was no lack of willingness to cooperate, but rather that the information is such as the Agent-In-Charge did not care to reveal it.
>
> "The applicant denied being a communist. Asked whether his employer, Mr. Bogdanow, was a communist, the applicant replied: 'I don't know.'
>
> "The Applicant was born and reared in New York and came to Houston only a few years ago.
>
> "We are not sure we can believe his statement that he does not know Mr. Bogdanow's communistic views, since they are a matter of common knowledge to the Bar and to the newspapers.
>
> "We have not been favorably impressed with this applicant, although our acquaintance is confined to a hearing given to him." (R. 5-6).

Thereafter, Petitioner filed exceptions to the Bar Committee's report (R. 7-9). These exceptions (1) challenged the sufficiency of the hearing granted Petitioner by the Committee, (2) asserted that the report was based on hearsay testimony and hence does not accord with the traditional concept of due process as expressed in the Fifth and Fourteenth Amendments to the United States Constitution, and (3) charged that the Committee procedure was highly arbitrary and capricious, and its recommendation motivated by prejudice and reached by reliance on inadmissible evidence.

It was on his exceptions to the Bar Committee's recommendation that the District Court accorded Petitioner a hearing. At the beginning of this hearing Petitioner was afforded a choice of having his application referred back to the Committee so that he could offer additional proof or of standing on his exceptions. Judge Kennerly said (R. 9-10):

> "The matter for this afternoon is that Mr. Ben G. Levy filed his application for admission to this Bar, and it was referred to the Bar Committee, and we have a report dated September 28, 1953, from that Committee.
>
> "I am informed, Mr. Levy, that under the rules the report of the Committee was regarded in the nature of a report from a Master in Chancery.
>
> "As I understood the rules, Mr. Levy had two courses open to him. One was to re-submit the matter to the Bar Committee for any further evidence that he thought ought to be taken, and the other was to except to the report as made. He has chosen, as I understand him, to except to the report, and we are here to hear you now, Mr. Levy, on your exceptions. Do you still want to pursue that course?"

"Mr. Levy: Yes, Your Honor.

"Judge Kennerly: All right, you may proceed."

During the argument on the exceptions, Petitioner attempted to convert the proceeding into one for the reception of additional evidence, at which time Judge Kennerly again reminded him of the true nature of the proceeding (R. 19):

> (Mr. Levy): "Your Honors, I am hereby waiving all immunities in requesting that I be placed under oath to answer any relevant questions that deal with my political views or my past or present record.
>
> "Judge Kennerly: I think, Counsel, that we indicated at the beginning of the hearing that any evidence would properly be only before the Committee, and since you have chosen the other course, of excepting to the report, why, we are not confined to listen to evidence in the case. The evidence is to be taken by the Committee.
>
> "Mr. Levy: Yes, Your Honor.
>
> "Judge Kennerly: But we, of course, are glad to have your statement and your views about these matters."

Petitioner had previously announced his creed and volunteered a lengthy statement of political views (R. 10-19). He then invited questions from the Bench and in so doing admitted the relevancy of the inquiry (R. 26). The fact that he gave the Court an insight into his ideas cannot now be used by Petitioner to support his contention that he was improperly denied admission to the Bar, and there is absolutely no showing that the Court's order was grounded on an objection to his speech or thought. On the contrary, the full right of free speech was granted applicant by the patient Judges. He read from notes and talked on a wide

range of subjects (R. 10-33) until he acknowledged that he was finished (R. 33).

The right of the Bar Committee and the Court to make pertinent inquiries without invading constitutional rights is shown by the following language from *In Re Anastaplo*, 3 Ill. 2d 471, 121 N.E. 2d 826, 832.

> "Further, in regard to the contention that petitioner's right of free speech has been infringed upon by the inquiries of the committee, we may also consider the established principle of this jurisdiction that the practice of law is a privilege, not a right. In granting that privilege we may impose any reasonable conditions within our control and if an applicant does not choose to abide by such conditions he is free to retain his beliefs and go elsewhere. Among other things, the granting of the privilege to practice law in this State is conditioned upon proof by the applicant of his good moral character, of his general fitness to practice law and of his good citizenship, and upon the taking of an oath to support the State and Federal constitutions. Such conditions are almost universal in this land and, so far as we can ascertain, their reasonableness has never been attacked. When an applicant, knowing of such conditions, applies for admission and signifies that he will take the oath of lawyer, we think it inconsistent with the privilege he seeks that he should be permitted to defeat pertinent inquiry into his ability to fulfill such conditions by any claim of the right of free speech. This has been the principle applied in the field of public employment to sustain a finding that such employees agree to suspend their constitutional rights of free speech by the implied terms of their employment. * * * In seeking the privilege of admission before this court, petitioner must be deemed to have agreed to waive his constitutional right of free speech against relevant inquiry."

Following the hearing on the exceptions the Court recessed and thereafter issued its order approving the Bar Committee's recommendation (R. 34). In this connection the Court noted that all applicants carried "the burden of showing that their private and personal characters are unexceptional" (R. 36). It is apparent that the three Judges agreed with the Bar Committee that the Petitioner had failed to satisfy the burden of proof. This was also recognized by the Court below. (R. 40).

Although excepting to the adequacy of the hearing afforded him, and to the evidence upon which the Committee based its recommendation, Petitioner studiously avoided a course which would have resulted in a more thorough investigation being made of him and of his association with Morris Bogdanow, and which would have afforded him an opportunity to present any evidence he considered pertinent.

When the Bar Committee reported (R. 5):

> "We are not sure we can believe his statement that he does not now know Mr. Bogdanow's communistic views, since they are a matter of common knowledge to the Bar and to the newspapers,"

it was in effect a demand for further information from Petitioner.

In a similar fact situation and concerning this very point, the Supreme Court of Illinois stated:

> " * * * If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. * * * " *(In Re Anastaplo,* 3 Ill. 2d 471, 121 N.E. 2d 826, 831).

Petitioner now states in his brief on page 9 that:

> "The grave accusation made by the Bar Committee is obviously based on no concrete fact, but only on public gossip and irresponsible hearsay."

Had the recommendation of the Committee been unwarranted, Petitioner was afforded every opportunity to establish that fact by the introduction of any evidence which he cared to produce. Had the reputation which the Committee accorded Mr. Bogdanow been unjustified, this could have been established readily. In the face of such findings it is indeed surprising that Petitioner did not accept gladly the opportunity to disprove them, if they were not true. His failure to follow this course and present further evidence to the Bar Committee creates a strong presumption that any additional light shed on the issues would be to Petitioner's disadvantage.

The case of *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, is clearly in point. In that case, H. Ely Goldsmith filed a petition in the Supreme Court of the District of Columbia asking for a writ of mandamus against the United States Board of Tax Appeals seeking (1) to compel the Board to enroll him as an attorney with right to practice before the Board and (2) to enjoin the Board from interfering with his appearance before the Board in behalf of taxpayers. The applicant had filed his application for admission and was advised that the question of his admission to practice had been referred to a committee for investigation. Later he received notice that his application had been received, considered and denied. The applicant made no further application to the Board to be heard. Upon filing of his petition, a Judge of the Supreme Court of the

District ordered a rule against the Board to show cause; the members of the Board answered the rule and set forth their reasons for denial of the application. The petitioner then replied, among other things, that there was no competent evidence on the issue presented, merely hearsay. The Supreme Court dismissed the petition for mandamus and the Court of Appeals of the District affirmed the judgment and when the controversy was presented to the United States Supreme Court, Mr. Chief Justice Taft delivered the opinion of the court and made the following relevant statement (p. 123):

> "The petitioner as an applicant for admission to practice was, therefore, entitled to demand from the board the right to be heard on the charges against him upon which the board has denied him admission. *But he made no demand of this kind.* Instead of doing so, he filed this petition in mandamus in which he asked for a writ to compel the board summarily to enroll him in the list of practitioners, and to enjoin it from interfering with his representing clients before it. He was not entitled to this on his petition. Until he had sought a hearing from the board, and been denied it, he could not appeal to the courts for any remedy, and certainly not for mandamus to compel enrollment." (Emphasis added).

The Bar Committee was not guilty of an abuse of discretion in withholding its approval, for Petitioner had the burden of proving to the satisfaction of the Committee and the Court that he was entitled to membership in the Federal Bar. One may ask what Local Rule 5(a) required when it specified that an applicant's "private and personal character shall be unexceptional". Language used by the Court in *Re Farmer*, 191 N.C. 235, 131 S.E. 661, is pertinent. There

a North Carolina statute set up a similar standard when it provided that "all applicants who satisfy the court of their competent knowledge of the law and upright character may receive a license to practice law in all the courts of the State." The Court stated at 131 S.E. 663:

> "This 'upright character,' prescribed by the statute, as a condition precedent to the applicant's right to receive license to practice law in North Carolina, and of which he must, in addition to other requisites, satisfy the court, includes all the elements necessary to make up such a character. It is something more than an absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should, or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing if it is right, and the resolve not to do the pleasant thing if it is wrong. 'Character,' said Mr. Erskine in the trial of Thomas Hardy for high treason, 'is the slow-spreading influence of opinion arising from the deportment of a man in society, as a man's deportment, good or bad, necessarily produces one circle without another and so extends itself till it unites in one general opinion.' Even more is this true when the restoration of character, as here, is the subject of consideration. It is then a matter of time and growth."

Local Rule 5 requires that an applicant must show more than the absence of bad character. There rests an affirmative burden upon him of showing the acquisition of a good name. As stated in *Rosencranz v. Tidrington*, 193 Ind. 472, 141 N.E. 58, 59:

"One of the necessary qualifications to entitle a person to admission to the bar is that he be of good moral character * * *. By asking such admission appellee put his own good moral character directly in issue and assumed the burden of proof as to that issue."

To the same effect, see *Baker v. Varser,* 240 N.C. 260, 82 S.E. 2d 90, 97.

In *Spears v. State Bar of California,* 211 Cal. 183, 294 Pac. 697, the California Supreme Court said:

"It should be noted that the burden of establishing good moral character rests upon the applicant" (p. 698)

"In Re Wells, 174 Cal. 467, 163 P. 657, 660, this court said, Mr. Justice Shaw writing the opinion: 'It is contended on behalf of the applicant that upon an attorney's application for admission the court cannot reject him for want of good moral character, unless it appears that he had been guilty of acts which would be cause for his disbarment or suspension. We think this proposition cannot be sustained. On his admission on certificate he must produce "satisfactory evidence of good moral character." *The burden is on him to do this.* In a proceeding to disbar an attorney the burden is on the accuser to prove moral turpitude. The requirement on his admission is to prevent the accrediting of untrustworthy persons as fit to receive the confidence attending upon the relation of attorney and client. The inquiry may extend to his general character as well as to particular acts. *It is broader in its scope than that in a disbarment proceeding.* The court may receive any evidence which tends to show his character for honesty, integrity, and general morality, and may no doubt refuse admission upon

proofs that might not establish his guilt of any of the acts declared to be causes for disbarment.'" (p. 699) (Italics provided by court)

* * *

"As stated in Re Wells, supra, the burden of establishing his good moral character is upon an applicant for admission. Although the committee of bar examiners will make as thorough an investigation as possible, they are not required to undertake the burden of disproving an applicant's allegations of good moral character. And if the proof offered by an applicant falls short of convincing the committee of bar examiners, it is their privilege and their duty to refuse to recommend such applicant for admission to the bar of this state." (p. 700)

* * *

"While the powers of the committee of bar examiners are merely recommendatory, and not binding upon this court, nevertheless, the committee of bar examiners was expressly created by statutory enactment for the definite purpose of relieving the court of the onerous duty of examining applicants for admission and investigating their fitness both as to legal learning and moral character to practice law in this state, and this court, recognizing this fact, will refuse to exercise its power in contravention to the adverse recommendation of the committee of bar examiners unless a convincing showing is made by the applicant to the court that such adverse recommendation is not based upon sound premises and valid reasoning." (p. 700)

Petitioner contends on page 27 of his brief:

"A. The hearing before the Bar Committee appointed to pass upon such applicants for admission to practice before the United States Court was wholly inadequate;".

If we concede, for purposes of argument only, that the hearing was inadequate as Petitioner contends, then should not Petitioner have accepted the offer of Judge Kennerly to re-submit the matter to the Committee (R. 9)? Having failed to avail himself of this opportunity, Petitioner should not be permitted now to contend that the hearing was "wholly inadequate".

Petitioner further contends on page 27 of his brief:

> "B. The Courts below, particularly the hearing in the District Court, failed to supplement or to remedy what had happened (or had not happened) before the Bar Committee;".

Petitioner proceeds on the assumption that the burden was on the Court to prove that he did not have the necessary qualifications. Just the reverse was true; the burden was on Petitioner to prove that he possessed such qualifications. The hearing before the Judges was not an adversary proceeding and Petitioner was duly apprised of its nature (R. 10-19). Petitioner cannot now complain that he was unable to present relevant evidence, when he deliberately avoided a re-submission of the matter to the Bar Committee. Any inadequacy in presentation is Petitioner's fault and not that of the Committee or the Judges. Petitioner must abide his own choice, and if in choosing the wrong procedural course he failed to sustain the proper burden of proof, he cannot assert that others have deprived him of constitutional rights.

The right to practice law is a privilege. One who would avail himself thereof must prove himself worthy of exercising the privilege. As Mr. Justice Cardozo stated in *Re Rouss*, 221 N.Y. 81, 116 N.E. 782, 783:

"Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. Selling v. Radford, 243 U.S. 46, 37 S. Ct. 377, 61 L. Ed. 585 (Ann. Cas. 1917D, 569); Matter of Durant, 80 Conn. 140, 147, 67 A. 497, 10 Ann. Cas. 539. Whenever the condition is broken the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character like the examination into learning, is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime. The examination into character is renewed; and the test of fitness is no longer satisfied. For these reasons courts have repeatedly said that disbarment is not punishment. * * * "

In *Re Frank*, 293 Ill. 263, 127 N.E. 640, an applicant for admission to the Bar was turned down by the Committee on character and fitness. He then made a motion for leave to file an application for a license to practice law. The Court stated at page 640:

"The petition presented with the motion shows that the petitioner has complied with all the requirements of the rule, except as to the production of this certificate, which the committee on character and fitness has refused to issue. The petition avers that the petitioner is a man of good moral character and reputation, and shows that in compliance with a notice from the committee on character and fitness he appeared before that committee, and also presented affidavits and letters pertaining to his character and fitness, but that the committee had refused to grant him the certificate required by the rule, for the reason that the evidence submitted fails to establish affirmatively to the satisfaction of the committee that the petitioner possesses

such character and general fitness as would qualify him for admission to the bar and the performance of the duties of an attorney and counselor at law. The petitioner offers to submit to any examination the court may direct and prays that he may be granted a license, or that a rule be entered on the committee on character and fitness to answer the petition.

"The court will not ordinarily review the decision of the committee on character and fitness against granting a certificate. If such review may be had in any case, it will be only where there has been an arbitrary refusal to hear and consider evidence which may be presented, or a willful refusal of a certificate manifestly not based upon an investigation and consideration of the applicant's qualifications. No such showing is made by this petition. It appears only that the committee, after an examination of the petitioner and of such evidence as was produced, was not satisfied that he possessed such character and general fitness as in the opinion of the committee justified his admission to practice. The granting of the certificate is committed to the judgment and discretion of the committee after a personal examination of each applicant and an investigation of his previous history and such evidence as may be produced. Unless a manifest abuse of this discretion is clearly shown, its judgment will be accepted as final, and no-re-examination of its decision will be undertaken. The judgment of the committee will not be overruled for a mere difference of opinion as to the qualifications and general fitness of the applicant.

"The motion will be denied."

The denial of Petitioner's application under all of the circumstances was not a violation of due process of law. Nothing in the record substantiates Petitioner's conclusions that either the Committee or the Judges were hostile to him,

or that their respective decisions were motivated by personal opinions differing from his own. Petitioner simply failed to prove to the satisfaction of the Committee and the Judges that he had the requisite qualifications.

III.

The action of the Committee on Admissions and that of the District Judges did not violate any rights guaranteed Petitioner by the First Amendment of the Constitution.

At the outset of our consideration of this point, we wish to record our objection to the language contained on page 18 of Petitioner's brief which suggests that racial and religious bigotry were the bases of the Committee's recommendation and the Court's order. The so-called "Unspoken Charge":

> "Was the Petitioner rejected because he was a New York Jew?"

is to be deprecated as an unwarranted challenge of the integrity of the District Court Judges and the members of the Committee on Admissions. It is without substantiation in the record for Petitioner on the very same page admits:

> "A second point not mentioned anywhere is that the Petitioner is a Jew."

There is nothing in the record to support the present contention of Petitioner that he was deprived of admission because of his religious beliefs. It is true that there was a discussion of church membership and spiritual attitudes in which Petitioner willingly participated (R. 20), but it does not follow because such inquiry was undertaken and Peti-

tioner's application subsequently declined that the Court's refusal was a discrimination because of religious beliefs.

After Petitioner announced his creed and provided a lengthy expostulation of political views he invited the Judges to examine his attitudes and, in so doing, he admitted the relevancy of the inquiries (R. 26). Under the circumstances, this was not an invasion of his Constitutional rights to free speech. *In Re Anastaplo*, 3 Ill. 2d 471, 121 N.E. 2d 826, 832.

Petitioner has been the aggressor; he has raised the cries of racial, religious, sectional and philosophical intolerance after making pointed efforts to draw to the attention of one and all how he differs in each category from the majority. Now, by virtue of these very differences and not through compliance with the Local Court Rules, Petitioner demands entry into the District Court Bar. On such basis alone it cannot be granted. He was provided with timely advice of the courses available to him and of the fact that evidence was only to be taken by the Committee, but he chose to stand on the sufficiency of the credentials that he provided. He has failed to show that the Committee's unfavorable recommendation was unjustified or that his rights to freedom of speech, belief and religion have been infringed.

IV.

The issue is moot.

The order of the District Judges was entered on November 24, 1953 and stated:

"However, Applicant shall have the right at any time after one year from this date to again apply for admission to this Bar." (R. 36).

Inasmuch as the Petitioner was denied membership in the Bar for only the suggested period which has now passed, he is free to re-apply for membership.

> "The District Judges in this instance did not permanently close the doors of the court to the admission of Appellant, but expressly reserved to him the right within twelve months thereafter, to renew his application. The record evidences the apparent purpose upon the part of the District Judges to deal fairly with the applicant. All presumptions of regularity must be entertained by this Court concerning the report of the Bar Committee and the order of the Judges. Applicant was expressly offered the privilege of making a record upon which he could appeal, but declined to do so." (R. 41).

Therefore, the question is moot and the cause should be dismissed.

V.

The order was non-appealable and the cause should be dismissed.

Brooks v. Laws, 208 F. 2d 18, (U.S.C.A. D.C.).

Conclusion

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

LEROY DENMAN MOODY
TOM MARTIN DAVIS
FRANK J. KNAPP
Counsel for Amicus Curiae

Proof of Service

I, C. A. Woodard, a clerk in the office of Messrs. Leroy Denman Moody and Tom Martin Davis, attorneys of record for Houston Bar Association, Amicus Curiae herein, depose and say that on the 9th day of March 1955, I served a copy of this Brief on Bernard A. Golding, Esq., counsel of record for Petitioner Ben G. Levy, by delivering the same to the receptionist in his office at 432 Niels Esperson Building, Houston 2, Texas.

C. A. Woodard

Subscribed and sworn to, before me, at Houston, Texas, this 9th day of March, 1955.

Irene Outwin

Irene Outwin,
Notary Public in and for
the County of Harris,
State of Texas.

APPENDIX A

CONSTITUTIONAL AMENDMENTS
STATUTE AND COURT RULE INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

First Amendment,
United States Constitution.

"No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *."

Fifth Amendment,
United States Constitution.

Title 28, U. S. Code Annotated
"Section 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961, amended May 24, 1949, c. 139, Section 102, 63 Stat. 104."

Local Rules of the United States District Court for the Southern District of Texas, Rule 5: Admission of Attorneys.

"(a) Any attorney who resides in the State of Texas and who has been heretofore or may be hereafter licensed by the District or Superior Courts of the State of Texas, and is

a member in good standing of the Texas State Bar, whose private and personal character shall be unexceptional, and who is competent to practice in this Court, may be admitted to the Bar of this Court in the manner hereinafter set forth."

* * *

"(b) Each applicant for admission shall file with the Clerk his Original and Duplicate Application, setting forth:

(1) His personal statement under oath giving the date and place of his birth, the names of his parents, his place of residence and office address, the courts to which he has been admitted, the places where he has been a practioner, and, if he is not a native born citizen, the date and place of his naturalization, and information respecting any action of any court that would have a bearing on his conduct, competency, or fitness as a member of the bar; and

(2) Attach to the Original Application as Exhibits two letters or signed statements (which need not be in duplicate) of members of the bar of this Court, not related to the applicant, who are resident practioners within this District, stating that the applicant is personally known to them, that he is competent to practice in this Court, and possesses all the qualifications required for admission to the bar of this court, that they have examined his personal statement and that they affirm that his private and professional character and standing are good; and

(3) Also attach certificate or other documentary evidence (which need not be in duplicate), showing that he has been licensed as provided in Subparagraph (a) hereof.

"(c) For the purpose of examining into and reporting on the fitness, competency, and qualifications of all appli-

cants for admission to the Bar of this Court, there is hereby created for each Division of the Court where the Court shall deem necessary a committe of three members of the Bar of this Court, to be appointed by the Judges of this Court as a standing committee for such purpose. One member of such Committee shall be designated Chairman. When any application is filed with the Clerk, he shall, after making a record of same in a book to be kept for that purpose, immediately refer the same to the committee in charge, transmitting to the Chairman thereof the Original Application and attached Exhibits. Such Committee, as soon as such application is referred to it, shall, in such manner as it may deem proper, at once make an investigation of the fitness, competency, and qualifications of the appellant, and for such purposes the committee shall have the power given a Master of this Court under Rule of Federal Procedure 53 to summon witnesses, administer oaths, and take testimony by deposition or otherwise, when in its opinion it is desirable to do so, and shall file a report in writing, showing the result of such investigation, within thirty days thereafter, unless the Court may extend such time for a longer period and shall with its report return to the Clerk such Original Application, Exhibits, and other papers.

"(d) After the petition has been filed for thirty days, and has been referred to the Committee above provided for, and the Committee has filed its report thereon, the applicant may, either with or without further hearing before the Court, by order of the Court, be admitted or denied admission to the Bar of this Court. When so admitted, the applicant shall pay the fees provided by law, subscribe the roll in the office of the Clerk, and upon the motion of a member of the Bar of this Court in open Court take either the oath or affirmation of the following tenor:

'I do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court according to the best of my ability and learning, and with all good fidelity as well to the Court as to the client. That I will use no falsehood nor delay any person's cause for lucre or malice, and that I will support the Constitution of the United States. So help me God.' "